No. 75-1439

In the Supreme Court of the United States

OCTOBER TERM, 1976

JERRY LEE SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the court of appeals (App. 44-46) is not yet reported. The order of the district court (App. 32-34) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 13, 1976 (App. 46). On March 9, 1976, Mr. Justice Blackmun extended the time for filing

a petition for a writ of certiorari to and including April 12, 1976. The petition was filed on April 9, 1976, and was granted on June 21, 1976. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in a federal prosecution for the mailing of obscene material wholly within a State, the fact that the State does not make criminal the distribution of such material to adults bars the jury from concluding that under contemporary community standards the material appealed to the prurient interest.

2. Whether the federal statute prohibiting the mailing of obscene matter (18 U.S.C. 1461) is unconstitutionally vague as applied in this case.

3. Whether prospective jurors should have been questioned on *voir dire* concerning their knowledge of contemporary community standards for determining whether allegedly obscene materials, taken as a whole, appeal to prurient interest.

STATUTE INVOLVED

18 U.S.C. 1461 provides in pertinent part:

> Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and—
>
> * * * * *
>
> Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly,

> where, or how, or from whom, or by what means any of such mentior d matters, articles, or things may be obtained or made * * *
>
> * * * * *
>
> Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.
>
> Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section or section 3001 (e) of Title 39 to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Iowa, petitioner was convicted of seven counts of mailing obscene material, in violation of 18 U.S.C. 1461. He was sentenced to concurrent terms of three years' imprisonment, with thirty months of that term suspended, and to concurrent three-year terms of probation on each count (App. 35). The court of appeals affirmed (App. 44-46).

The indictment charged, and the evidence established (App. 38-40), that between February and October 1974, petitioner knowingly mailed various issues of "Intrigue" magazine (GX. 4A, 10A, 6A, 7A, 8A), from Des Moines, Iowa, to addresses in Mount Ayr and Guthrie Center, Iowa (App. 3-4).[1] That magazine depicted nude males and females engaged in masturbation, fellatio, cunnilingus and intercourse (App. 6-7). In addition, on separate occasions in July 1974, petitioner mailed from Des Moines two films (GX. 12B, 14B) entitled "Lovelace" and "Terrorized Virgin" to Mount Ayr, Iowa (App. 5).[2] "Lovelace" depicted a nude male and a nude female engaged in masturbation and simulated acts of fellatio, cunnilingus and sexual intercourse (App. 5). "Ter-

[1] When the case was before the court of appeals, the transcript of the proceedings in the district court had not been prepared except for the portions relating to the selection of the jury and petitioner's motion for a judgment of acquittal. Our statement of the facts relies principally upon the agreed statement of the record on appeal filed in the court of appeals under Rule 10(d), Fed. R. App. P., which lists by number (identified at App. 13-16) the exhibits relating to the mailings. We are also lodging with the Court a copy of the trial transcript which has subsequently become available.

Petitioner conceded on appeal (App. 38-39) and concedes in this Court (Br. 6, 10, 33) that the materials were knowingly mailed by him and received by postal authorities.

[2] All materials involved here were the subject of test purchases by postal authorities in Mount Ayr and Guthrie Center, Iowa (Tr. 73, 78, 91). Mount Ayr, Guthrie Center and Des Moines are located in the Southern District of Iowa (Tr. 78, 93).

rorized Virgin" depicted two nude males and a nude female engaged in fellatio, cunnilingus and intercourse (App. 5-6).

Petitioner did not testify. In defense, he introduced numerous sexually explicit materials purchased at various so-called "adult book stores" in Des Moines and Davenport, Iowa, and several advertisements for a local newspaper, the *Des Moines Register and Tribune* (App. 40-41; Tr. 113-114, 118-126, 158-159). In addition, he placed in evidence chapter 725 of the Iowa Code, which at that time prohibited the dissemination or exhibition of "obscene material" only to minors (Tr. 131). See Section 725.2, 1975 Code of Iowa (App. 47-50).[3] He then moved for acquittal

[3] Following the Court's decision in *Miller* v. *California*, 413 U.S. 15, the Iowa Supreme Court held that a state statute (§ 725.3, 1973 Code of Iowa) prohibiting the presentation of an obscene drama, play, show or entertainment which would tend to corrupt the morals of youth or others, was unconstitutionally vague and overbroad. See *State* v. *Wedelstedt*, 213 N.W. 2d 652 (Iowa). Subsequently, the state legislature passed a new obscenity law—The Iowa Obscenity Act, ch. 1267, Act of the 65th G.A., 2nd Sess. This Act (ch. 725, 1975 Code of Iowa), effective on July 1, 1974, proscribed the dissemination of "obscene material" to minors but not to adults. (The materials in counts one through three were mailed prior to the effective date of that Act.)

Iowa has recently amended its obscenity statute The state legislature passed the final version of the new statute on May 28, 1976; the Governor signed the bill on June 28, 1976, to be effective January 1, 1978. The new statute prohibits the distribution to anyone, including consenting adults, of "material depicting a sex act involving sadomasochistic abuse, excretory functions, a child, or bestiality." Iowa Senate File 85, Section 2804.

on the ground, *inter alia*, that the Iowa obscenity statute proscribing the dissemination of obscene materials only to minors set forth the applicable community standard, and that the government had failed to show that the allegedly obscene material offended that standard (Tr. 132-135). The district court denied the motion (Tr. 135).

Following his conviction, petitioner moved for a new trial, again asserting that the state criminal laws defined community standards (App. 32). In denying this motion, the district court stated that the federal statute (18 U.S.C. 1461) "neither incorporates nor depends upon the laws of the states" (App. 33). It reasoned that "[r]egardless of the state laws, federal proscriptions still remain upon the mailing of obscene materials" because the community standard is not determined "by what a state legislature has elected to tolerate" (App. 33). The court concluded that whether certain nonregulated conduct is approved by the citizens of that state "is a question of fact to be resolved by the jury" (App. 33).

The court of appeals affirmed. It relied upon the statement in *Hamling* v. *United States*, 418 U.S. 87, 104, that each juror in arriving at his view of the contemporary community standard was "entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes * * * " (App. 46).

The court stated (App. 46):

> [W]e note that the trial court admitted into evidence a copy of Iowa's obscenity statute. This

> was done so the jury might have the knowledge of the state's policy on obscenity when it determined the contemporary community standard. However, state policy was not controlling since the determination was for the jury, not the state. The jury could have followed state policy if it found that it was the contemporary community standard; but it did not so find as it had a right to do.

SUMMARY OF ARGUMENT

Miller v. *California*, 413 U.S. 15, redefined constitutional guidelines for finding, as a fact under state and federal law, whether materials are obscene. *United States* v. *12 200-Ft. Reels of Film*, 413 U.S. 123, 129-130. The contemporary community standards element of *Miller's* three-part test refers to a factual determination as to whether that material appeals to a prurient interest in sex. Iowa's legislative determination not to make criminal the distribution of obscene material to adults expresses the state's public policy that even distribution of material that is obscene under *Miller* should not be grounds for prosecution under state law. The Iowa statute does not declare by legislative fiat that in Iowa the kind of hard core pornography involved here does not in fact appeal to the prurient interest. Nor does it purport to regulate the mails. Whether interstate or intrastate, the mails are exclusively a federal sphere of responsibility, subject to control only by Congress. Congress has closed the mails to hard core pornography without reference to state law, and in a series

of cases culminating in *Hamling* v. *United States*, 418 U.S. 87, this Court has held that it may constitutionally do so. The jury in this case was permitted to determine for itself the extent to which the Iowa statute reflected contemporary community standards. The jurors were not free to apply subjective notions about obscenity since they were carefully instructed under the objective "average person/community standards" test of *Miller*, *12 200-Ft. Reels*, and *Hamling*.

Because federal law, rather than the Iowa Code governs the mails, and 18 U.S.C. 1461 has been construed to be limited to hard core pornography (*Hamling*, *supra*), the statute adequately informed petitioner that he was subject to federal prosecution if he mailed such material anywhere.

Finally, the district court properly refused to permit *voir dire* questioning of prospective jurors as to their knowledge of community standards. The capacity of jurors to apply the *Miller* standards without special inquiry into their personal knowledge of contemporary standards in their community was recognized in *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 56 and *Hamling*, 418 U.S. at 104-105.

ARGUMENT

I. A JURY IN A FEDERAL PROSECUTION FOR MAILING OBSCENE MATERIAL MAY DETERMINE THAT UNDER CONTEMPORARY COMMUNITY STANDARDS THE MATERIAL APPEALS TO THE PRURIENT INTEREST, EVEN THOUGH THE STATE IN WHICH THE MAILS WERE USED AND THE TRIAL TOOK PLACE DOES NOT MAKE CRIMINAL THE LOCAL DISTRIBUTION OF OBSCENE MATERIAL TO ADULTS.

In *Miller* v. *California*, 413 U.S. 15, this Court redefined the constitutional standards under the First and Fourteenth Amendments governing State criminal statutes punishing distribution of obscene materials. In *United States* v. *12 200-Ft. Reels of Film*, 413 U.S. 123, 129-130, this Court held that the same standard applies in federal obscenity prosecutions, and in *Hamling* v. *United States*, 418 U.S. 87, it was held applicable to the mailing of hard core pornography.

In *Miller*, the Court held (413 U.S. at 24):

> [t]he basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, *Kois* v. *Wisconsin*, *supra*, at 230, quoting *Roth* v. *United States*, *supra*, at 489; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Iowa presently makes criminal the distribution of obscene material only to minors but not to adults.[4] Petitioner argues that since his distribution of obscene material in Iowa would not be a crime under the law of that State, the jury in this federal obscenity prosecution there could not properly determine that the material appealed to prurient interest under "contemporary community standards." The argument is that the contemporary community standards in Iowa regarding appeal to prurient interest are fixed by the State's legislative determination not to make the local distribution of obscene material a crime.

The fact that the State does not punish the distribution of obscene material to adults does not mean that under contemporary community standards such material cannot appeal to prurient interest. The legislative action of the State does not purport to be a determination on the latter issue; indeed, the State

[4] As noted (*supra*, p. 5, n. 3), Iowa recently amended its obscenity statute to make criminal the distribution of certain types of obscene material to everyone.

In addition to Iowa, at least six other states do not make generally criminal the distribution of obscene material to consenting adults. Colorado (Colo. Rev. Stat. Ann. 18-7-101 to 18-7-106; 18-7-401 and 402; 31-15-401 (1976) (adult exemption does not apply to "sadomasochistic" materials, 18-7-104); Montana (Rev. Codes of Mont. Ann. 94-8-110 (Spec. Crim. Code Supp. 1976) (exemption inapplicable to "pandering"); New Mexico (N.M. Stat. Ann. §§ 40-45-1 to 40-50-8 (Supp. 1975)); South Dakota (S.D. Comp. Laws Ann. 22-24-36 (Supp. 1976)); Vermont (13 V.S.A. §§ 2801-2807 (Supp. 1974)); West Virginia (W. Va. Code Ann. 61-8A-1 to 61-8A-7 (Cum. Supp. 1976)).

by legislative fiat could not determine that material that in fact appeals to prurient interest does not do so. The only determination the State of Iowa has made is that for policy reasons it will not prosecute the distribution of obscene material to adults. In other words, Iowa has concluded that even though particular material may appeal to prurient interest, as a matter of State policy it will not make criminal the distribution of the material to adults.

Petitioner argues that in the Iowa obscenity statute "the state legislature has declared that nothing could be 'obscene' under the prevailing 'contemporary community standards' " (Br. 23) and, therefore, that "the *governing law* made nothing 'obscene' for consenting adults in Iowa * * *" (Br. 22; emphasis added). The issue, however, is not whether Iowa has made nothing obscene for consenting adults there, but whether the Iowa statute precludes a jury in a federal prosecution in Iowa for distributing obscene materials intrastate through the mails from concluding that under contemporary community standards the material appeals to the prurient interest.

The Iowa statute does not purport to define the community standard for determining whether material appeals to the prurient interest. It does not declare or even imply that in Iowa hard-core pornography (such as is here involved) should not be deemed to appeal to that interest; it had merely made the local distribution of such material to adults non-criminal under state law. The Iowa obscenity statute does not attempt to regulate or establish

standards for the intrastate uses of the mails in Iowa to transport obscene material, and it could not do so.

The application of the federal mail statutes does not depend upon or incorporate state law touching on the same subject. The constitutional power of Congress over the mails (Art. I, Section 8, cl. 7) is "exclusive" (*Hannegan* v. *Esquire, Inc.*, 327 U.S. 146, 156 n. 18, quoting S. Doc. 118, 24th Cong., 1st Sess. 3) and "embraces * * * the entire postal system" (*Ex parte Jackson*, 96 U.S. 727, 732), subject only to other constitutional requirements. See, *e.g.*, *Blount* v. *Rizzi*, 400 U.S. 410 (administrative censorship); *Rowan* v. *Post Office Dept.*, 397 U.S. 728 (mailing lists); *Lamont* v. *Postmaster General*, 381 U.S. 301 (communist political propaganda); *Marcus* v. *Search Warrant*, 367 U.S. 717 (seizure of allegedly obscene material). Under the postal power Congress may refuse "to include in its mails such printed matter or merchandise as may seem objectionable to it upon the grounds of public policy * * *." *Public Clearing House* v. *Coyne*, 194 U.S. 497, 507; *In re Rapier*, 143 U.S. 110; *Ex parte Jackson*, *supra*. Because the postal power is separate from the power to regulate interstate commerce (Art. I, Section 8, cl. 3), federal mail statutes apply equally to interstate or intrastate uses of the mails.

A state cannot impose a "direct, physical interference" on the valid exercise of the postal power, nor can its law cause "some direct, immediate burden on the performance of the postal functions." *Railway Mail Assn.* v. *Corsi*, 326 U.S. 88, 96. The

postal power includes the authority to prohibit uses of the mails, whether or not the states prohibit the underlying activity. See, *e.g.*, *Parr* v. *United States*, 363 U.S. 370, 389; *United States* v. *States*, 488 F.2d 761, 767 (C.A. 8). Whenever Congress exercises its power over any federally-regulated facility, including the mails, it is irrelevant that the state within which that facility is located does not also proscribe that activity.

For more than 100 years, since the Comstock Act of 1872 (Act of 1872, ch. 335, Section 148, 17 Stat. 302, as amended, Act of March 3, 1873, ch. 258, Section 2, 17 Stat. 599), Congress has prohibited the mailing of obscene matter.[5] The constitutionality of that Act was upheld in *Ex parte Jackson*, *supra*. The present statute (18 U.S.C. 1461), like its predecessors, broadly prohibits the distribution of any obscene material through the mails without regard to whether the mailing is inter- or intrastate, whether the recipient has sought the material or objects to it, or whether the state in which the mailings are made or received itself prohibits the distribution of obscene materials. See, generally, *United States* v.

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[5] The Tariff Act of 1842, ch. 270, Section 28, 5 Stat. 566, contained the earliest congressional prohibition of obscene materials. Section 28 of that Act proscribed the "importation of all indecent and obscene prints, paintings, lithographs, engravings, and transparencies." The congressional power to prohibit the importation of "indecent prints" was recognized in *Thurlow* v. *Massachusetts*, 5 How. 609, 628. The constitutionality of its progeny, 19 U.S.C. 1305(a), was upheld in *United States* v. *12 200-Ft. Reels of Film*, 413 U.S. 123.

Reidel, 402 U.S. 351; *Roth* v. *United States*, 354 U.S. 476. See also Cairns, Paul and Wishner, *Sex Censorship: The Assumptions of Anti-Obscenity Laws and the Empirical Evidence*, 46 Minn. L. Rev. 1009, 1010 n. 2 (1962), for a historical sketch of federal obscenity law.

When Congress has intended to make the applicability of a federal criminal law turn upon state law, it has expressly so provided. For example, 18 U.S.C. 1955 makes illegal certain activities related to an "illegal gambling business," which is defined as a gambling business that, among other things, "is a violation of the law of a State or political subdivision in which it is conducted" (18 U.S.C. 1955(b)(1)(i)). Similarly, the anti-racketeering statutes define "racketeering activity" to include "any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year" (18 U.S.C. 1961(1)). The Travel Act makes illegal interstate travel in furtherance of "any unlawful activity," which it defines to include prostitution offenses, extortion, bribery, or arson "in violation of the laws of the State in which committed" (18 U.S.C. 1952(a), (b)). The transportation or sale in interstate or foreign commerce of "any wildlife taken, transported or sold in any manner in violation of any law or regulation of any State" is prohibited under 18 U.S.C. 43(a)(2).

The federal statute making criminal the transmission of wagering information in interstate or foreign commerce has an exception for "the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State where betting on that sporting event or contest is legal into a State in which such betting is legal" (18 U.S.C. 1084(b)). Finally, the Assimilative Crimes Act (18 U.S.C. 13) provides that any person guilty of any act or omission within areas of federal jurisdiction that has not been made criminal by federal law but that "would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment."

As these statutes show, when Congress intended to make the applicability of federal law depend upon state law, it has clearly and explicitly said so. It has not done so, however, in the federal statutes prohibiting the mailing of obscene materials. Instead, it has provided a federal standard that makes no reference to state law.[6] If the distribution of

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[6] Petitioner argues (Br. 32-33) that this Court should hold that state obscenity laws govern in federal obscenity prosecutions, as it ruled with respect to state law in diversity cases in *Erie Railroad Co.* v. *Thompkins*, 304 U.S. 64. *Erie* held that the earlier decision in *Swift* v. *Tyson*, 16 Pet. 1, which *Erie* overruled, had erroneously interpreted the Federal Judiciary Act of 1789 as authorizing the federal courts themselves to determine the rules of the common law. That statute,

obscene material through the mails meets the three-part test of obscenity set forth in *Miller*, it violates federal law, and it is irrelevant to that determination whether or not the state also punishes the conduct.[7]

In dealing with the mailing of obscene materials, Congress followed the same policy it adopted in legislation prohibiting the use of federally-regulated facilities to promote lotteries, without regard to whether the lotteries are illegal under the laws of the states involved. See, *e.g.*, 18 U.S.C. 1302 (use of the mails); 18 U.S.C. 1304 (use of radio or televi-

now contained in 28 U.S.C. 1652, provided that, except where the Constitution, treaties or statutes provided otherwise, the "laws of the several States * * * shall be regarded as rules of decision in trials at common law" (304 U.S. at 71). The court held in *Erie* that "in applying the [*Swift*] doctrine this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several States" (304 U.S. at 80). The present case is quite different, since it involves a federal substantive statute which, as shown, constitutionally establishes federal criminal standards that do not depend upon or adopt state law.

[7] The second element of the obscenity test announced for the states in *Miller* is "whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law" (413 U.S. at 24). That element, however, does not require reference to state law to determine obscenity *vel non* in a federal prosecution. In *Hamling* v. *United States*, *supra*, 418 U.S. at 114, the Court held that under 18 U.S.C. 1461 (the provision here involved), this element of the *Miller* test is met if the material constitutes "patently offensive representations or descriptions of that specific 'hard core' sexual conduct given as examples in *Miller* v. *California*." Whether the material meets that standard is a question of federal law, the answer to which is not dependent upon state law.

sion); 18 U.S.C. 1306 (federally insured financial institutions prohibited from selling lottery tickets). In enacting these statutes, Congress expressed a "national policy to refrain from using Federal facilities in the promotion and advertisement of lotteries * * *." S. Rep. No. 727, 90th Cong., 1st Sess. 3 (1967). This Court has held that lottery-related materials can be excluded from the mails or other federal facilities, notwithstanding the lawfulness of the lottery under state law. See, *e.g.*, *In re Rapier*, 143 U.S. 110 (Louisiana lottery); see, also, *New York State Broadcasters Ass'n* v. *United States*, 414 F.2d 990, 996 (C.A. 2), certiorari denied, 396 U.S. 1061 (18 U.S.C. 1304); *Boasberg* v. *United States*, 60 F.2d 185 (C.A. 5), certiorari denied, 287 U.S. 664; *United States* v. *Noelke*, 1 Fed. 426, 440 (C.C. S.D.N.Y.); *United States* v. *Politzer*, 59 Fed. 273, 275 (N.D. Cal.); see 15 Ops. Atty. Gen. 203 (1877).[8]

The purpose of the community standards element of the obscenity test "is to be certain that * * * material * * * will be judged by its impact on an average person, rather than on a particularly susceptible or sensitive person—or indeed a totally insensitive one" (*Miller* v. *California*, *supra*, 413 U.S. at 33). It is designed "to permit a juror sitting in obscenity cases to draw on knowledge of the community or vicinage from which he comes in deciding what conclusion 'the average person, applying contemporary community

[8] Congress has recently exempted state lotteries from certain restrictions (see 18 U.S.C. (Supp. V) 1307).

standards' would reach in a given case" (*Hamling* v. *United States*, *supra*, 418 U.S. at 105). The district court's instructions in this case amplifying the community standards factor properly explained the jury's role in deciding whether the materials are obscene. It informed the jury that it was to apply objective standards reflecting the views of the community rather than the personal subjective views of individual jurors.[9]

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[9] The court's instruction No. 9 (A. 22-23) stated:

> The phrase "average person, applying contemporary community standards" as used in test (a) in the preceding instruction requires some explanation. The community with which we are concerned is coextensive with the jurisdiction of this Court, roughly that part of the State of Iowa lying south of U.S. Highway 30.
>
> Contemporary community standards are set by what is in fact accepted in the community as a whole; that is to say, by society at large or people in general; and not by what some persons or groups of persons may believe the community as a whole ought to accept or refuse to accept. In determining the view of average persons of that community, you are each entitled to draw on your own knowledge of the views of the average person in the community from which you come as well as consider the evidence presented as to the state law on obscenity and materials available for purchase in certain stores as shown by the evidence.
>
> What may appear to some people to be in bad taste or offensive may appear to be amusing or entertaining to others. Obscenity is not a matter of individual taste. The personal opinion of a juror as to the material in question here is not the proper basis for a determination whether or not the material is obscene. As stated above the test is how the average person of the community as a whole would view the material.

To whatever extent the Iowa obscenity laws recognize and reflect the contemporary community standards, the jury in this case was permitted to take those laws into account. The jury was instructed that "[i]n determining the view of average persons of that community," it could "consider the evidence presented as to the state law on obscenity" as well as that regarding "materials available for purchase in certain stores as shown by the evidence" (A. 22-23). As the court of appeals held (A. 46): "The jury could have followed state policy if it found that it was the contemporary community standard; but it did not so find as it had a right to do."

The determination by the jury that the materials in this case are obscene does not interfere with or impinge upon the proper sphere of the State's regulatory power. The State, of course, has the power to regulate the intrastate distribution of obscene materials and to make criminal only distribution to minors but not to adults. The language from *Miller* upon which petitioner relies (Br. 24-25) recognizes that authority against the claim that the federal power over interstate commerce and the mails preempted the field and barred state regulation of intrastate distribution of obscene materials. See, also, *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 57-58.

But the existence of that power in the State of Iowa does not bar the application of the federal obscenity statute to mailings of obscene matter within the State. Federal and State power over this area are separate. The State's legislative decision not to

make criminal the local distribution of obscene material to adults does not convert that material into constitutionally protected speech, and it is not inconsistent with and does not preclude a federal prosecution for distributing those materials in Iowa through the mails. The conviction of petitioner for distributing this hard core material within Iowa through the mails does not violate or impede any state policy or standard governing matters within the proper sphere of state regulation.

The determination whether distribution of material is obscene under *Miller's* three-part test should be made criminal at all involves a matter of legislative policy. That determination must be made by the Congress or state legislatures within their respective spheres of constitutional responsibility. In contrast, "whether the average person applying contemporary community standards would find that the work, taken as a whole appeals to the prurient interest," is an objectively defined standard for a specific factual inquiry that is constitutionally required before a trier of fact may find material obscene (*Miller, supra*, 413 U.S. at 33; *Hamling, supra*, 418 U.S. at 107).

Petitioner's basic argument misconstrues *Miller* by confusing the factual inquiry with the policy question. Even in states that do not make the distribution of obscenity a crime, contemporary community standards may recognize, as a fact, that hard core pornography appeals to a prurient interest in sex. Nothing in *Miller* suggests that a state's legislative

decision not to make distribution of obscenity a crime changes the nature of such material or the community's recognition of its prurient appeal. Consequently, nothing in *Miller*, as a constitutional matter, bars a federal jury in such a state, in a prosecution under a valid federal obscenity law, from finding as a fact that such material has a prurient appeal.

II. THE FEDERAL STATUTE PROHIBITING THE MAILING OF OBSCENE MATTER INVOLVED IN THIS CASE (18 U.S.C. 1461) IS NOT UNCONSTITUTIONALLY VAGUE AS APPLIED

Petitioner's contention (Br. 7) that 18 U.S.C. 1461 is unconstitutionally vague as applied in this case is but another formulation of his major point that the lack of an Iowa statute prohibiting the distribution of obscene material to adults barred the jury from determining that under contemporary community standards the material appealed to prurient interest. The argument is that since his distribution of obscene matter was not a crime under Iowa law, the federal statute did not put him on notice that the distribution might nevertheless violate federal law under the community interest standard.

We have shown in point I, *supra*, that the federal statute properly may be applied to convict petitioner even though Iowa has not made the local distribution of obscene materials to adults a crime. The statute informed petitioner that, if he distributed obscene material through the mails, he would violate it. This Court held in *Hamling* v. *United States*, *supra*, 418

U.S. at 114, that the statute is limited to the hard core pornography described in *Miller* v. *California*, *supra*, and "[a]s so construed, we do not believe that petitioners' attack on the statute as unconstitutionally vague can be sustained." Petitioner makes no claim that the materials he distributed are not the kind of hard core pornography to which the statute may constitutionally be applied. As applied to petitioner, 18 U.S.C. 1461 is not unconstitutionally vague.

III. THE DISTRICT COURT PROPERLY REFUSED TO ASK THE PROSPECTIVE JURORS ON *VOIR DIRE* ABOUT THEIR KNOWLEDGE OF CONTEMPORARY COMMUNITY STANDARDS OF OBSCENITY

Petitioner requested the district court to ask the prospective jurors on *voir dire* whether they had knowledge of the contemporary community standards of obscenity, where that knowledge was acquired, what the standards were, whether they had considered the Iowa obscenity statute in reaching their understanding of the community standard and what that statute meant to them.[10] Petitioner also requested the trial court to ask the prospective jurors whether they were members of or in sympathy with any organization that promotes the regulation or banning of allegedly obscene materials.

The court asked the latter question (Tr. 18, 27-28),[11] but refused to ask the former questions relating to the jurors' understanding of a contemporary community standard. The court later stated that those questions were "no more required than would pretrial disclosure of a juror's concept of 'reasonableness' be necessary where that standard is an essential element" (App. 34), and concluded that its instructions on the contemporary community standard and the means by which the jurors were to determine that standard would be sufficient to insure a fair and unbiased jury without initial inquiry into the jurors' views on the subject.

The court of appeals upheld the district court's refusal to probe the jurors' knowledge of contemporary community standards, because those questions did not relate to "the qualifications to serve as a juror, bias" or any other relevant inquiry (App. 46). The court reasoned that a juror's understanding of the contemporary community standard is "inborn and often

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[10] The questions petitioner proposed were (App. 8):

(2) Will those jurors raise their hands who have any knowledge of the contemporary community standards existing in this federal judicial district relative to the depiction of sex and nudity in magazines and books?

(3) Where did you acquire such information?

(4) State what your understanding of those contemporary community standards are?

[Footnote continued on page 23]

[10] [Continued]

(5) In arriving at this understanding did you take into consideration the laws of the State of Iowa which regulate obscenity?

(6) State what your understanding of those laws are?

[11] One prospective juror who had signed a petition against pornographic materials was dismissed (Tr. 18-19).

undefinable" and cannot readily be expressed in words (App. 45).

These rulings were correct. The purpose of *voir dire* is to protect a defendant's right to trial by a competent, qualified and impartial jury (see, *e.g.*, *Ristaino* v. *Ross*, 424 U.S. 589; *Ham* v. *South Carolina*, 409 U.S. 524; *Aldridge* v. *United States*, 283 U.S. 308); "to test the qualifications and competency of the prospective jurors." *Hamling* v. *United States*, *supra*, 418 U.S. at 140. However, the " 'determination of impartiality is particularly within the province of the trial judge' " (*Ristaino* v. *Ross*, *supra*, 424 U.S. at 595, quoting *Rideau* v. *Louisiana*, 373 U.S. 723, 733 (Clark, J., dissenting)), who has "broad discretion as to the questions to be asked" (*Aldridge* v. *United States*, *supra*, 283 U.S. at 310) on *voir dire*.

The questions petitioner proposed were not related to the "qualifications and competency of the prospective jurors." *Hamling* v. *United States supra*, 418 U.S. at 140. On the contrary, they related to the jurors' understanding of the contemporary community standard and the Iowa obscenity law. The questions related to legal issues, of which the prospective jurors' knowledge is irrelevant to their qualifications to serve.[12] It is the court's function to in-

[12] See, *e.g.*, *United States* v. *Wooton*, 518 F.2d 943 (C.A. 3) (reasonable doubt); *United States* v. *Nance*, 502 F.2d 615, 620 (C.A. 8), certiorari denied, 420 U.S. 926 (*inter alia*, indictment as evidence of guilt); *United States* v. *Delay*, 500 F.2d 1360, 1366 (C.A. 8); *United States* v. *Crawford*, 444 F.2d 1404, 1405 (C.A. 10) (entrapment), certiorari denied,

struct the jury on the law; each juror need only express a willingness to follow that instruction. As noted above, the district court correctly instructed the jury regarding the ascertainment of community standards and the possible significance of the Iowa statute.

Petitioner contends (Br. 42), however, that a juror will not necessarily be able to determine the community's standards merely because he lives there, and that the jurors therefore should have been examined to determine whether they were "aware of the general attitudes toward and laws relating to depiction of sexually related matters currently prevailing there." This Court, however, has rejected such a limited view of the jury's capacities and capabilities; it has ruled that a jury is able to determine the obscenity *vel non* of material, which necessarily involves ascertaining and applying community standards, without the assistance of expert testimony. *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 56; *Kaplan* v. *California*, 413 U.S. 115, 121; *Ginzburg* v. *United States*, 383 U.S. 463, 465. Although expert testimony is usually necessary to explain to the jury that which "they otherwise could not understand," "[n]o such assistance is needed by jurors in obscenity cases." *Paris Adult Theatre I* v. *Slaton*, *supra*, 413 U.S. at 56 n. 6."[13]

404 U.S. 855; *Grandsinger* v. *United States*, 332 F.2d 80 (C.A. 10) (reasonable doubt). *Contra*, *United States* v. *Blount*, 479 F.2d 650 (C.A. 6) (reasonable doubt).

[13] The Court has left open the possibility of using expert witnesses in "the extreme case, not presented here, where

To the extent that petitioner's proposed questions were designed to uncover bias or prejudice among prospective jurors, the court's other questions adequately probed those issues. At the outset, the court directed a general question to the panel (Tr. 5-6):

> As indicated in the reading of the indictment, this is a case that involves allegedly obscene materials, which will involve exhibits which may show various sexual acts by men and women in various positions, both deviate and normal sex acts. I'm going to ask the entire jury panel, because of the nature of the particular case, are there any of you that would have a prejudice or a feeling in advance, or would be uncomfortable sitting in a trial of a case of this nature?

Later, as petitioner requested,[14] the court asked (Tr. 18):

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contested materials are directed at such a bizarre deviant group that the experience of the trier of fact would be plainly inadequate to judge whether the material appeals to the prurient interest." *Paris Adult Theatre I* v. *Slaton*, *supra*, 413 U.S. at 56, n. 6.

[14] Petitioner requested the court to ask (App. 8):

> Are any members of the panel a member of or are in sympathy with any organization which has for its purpose the regulating or banning of alleged obscene materials?

The court's question additionally inquired about contributions to and past expressions of sympathy with anti-pornographic organizations. Thus, the court probed somewhat more deeply into potential prejudice or bias than petitioner requested.

> Are any of you members, or have any of you made contributions to, or have you expressed, or are you in sympathy with any organization that has for its purpose the regulation or banning of alleged obscene materials? Can any of you answer that question in the affirmative? Member of any organization, or made any contribution to, or are in sympathy with an organization which concerns itself with the banning of obscene materials? [15]

The court's inquiry "was clearly sufficient to test the qualifications and competency of the prospective jurors." *Hamling* v. *United States*, *supra*, 418 U.S. at 140.[16]

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[15] As noted (*supra*, p. 23, n. 11) one prospective juror was dismissed as a result of this questioning.

[16] The American Library Association, *et al.*, as amicus curiae, argues that 18 U.S.C. 1461 is unconstitutional because it permits criminal sanctions for the mailing of obscenity without a prior civil proceeding. This contention is beyond the scope of the issues raised in the petition. As to amicus Association of American Publishers, Inc., *et al.*, we believe that its contentions are fully answered by the arguments set forth above.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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OCTOBER 1976.

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